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Mohamed Musa bin Amanullah v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–44 OF 2004
HASAN LAH, SULONG MATJERAIE AND MOHD HISHAMUDIN JJCA
1 MARCH 2010

C

Criminal Procedure — Appeal — Grounds of — Failure by trial judge to recuse himself — Whether wrong in law — Whether appellant given fair trial

D

Evidence — Statement — Cautioned statement — Failure to produce — Whether adverse inference could be drawn against appellant

E

The appellant and another ('the second accused') were jointly charged for an offence of trafficking in dangerous drugs in the High Court. The appellant was convicted and sentenced to death while the second accused was acquitted and discharged at the close of the case for the prosecution. The accused therefore appealed against the decision. The case was initially commenced before Abdul Kadir Musa J and was thereafter continued before RK Nathan J. The appellant advanced three main grounds of appeal, inter alia: (i) failure of the trial judge to recuse himself; (ii) misdirection on the part of the learned trial judge in ruling that the appellant ought to have produced his cautioned statement; and (iii) misdirection as regard to the standard of proof at the end of the defence case. The appellant's counsel submitted that the decision of the trial judge to continue hearing the case despite his earlier ruling recusing himself from hearing the matter was wrong in law. It was further submitted that in the circumstances the appellant could not be said to have been given a fair trial and the appellant was thus entitled to an unconditional release and the appeal ought to be allowed. It was also submitted that the learned trial judge was wrong in law in ruling that the appellant ought to have produced his cautioned statement to back up his story and that the judge had drawn an adverse inference against the appellant by virtue of his failure to produce his cautioned statement. The appellant submitted that no finding by the learned trial judge that the prosecution had proved its case against the appellant beyond reasonable doubt and that was fatal to the prosecution's case. The prosecution submitted that the appellant's right to a fair trial had not been violated and it was for the court to determine whether the appellant had established a violation of his fundamental right to a fair trial. The prosecution also submitted, relying on *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 that when the trial judge said the prosecution had successfully proven a prima facie case against the appellant what he meant was the case had been proven beyond

reasonable doubt. Alternatively it was submitted that the conviction was still safe having regard to the overwhelming evidence of the case and that no injustice had actually occurred by applying the proviso to s 60(1) of the Courts of Judicature Act 1964 ('CJA').

Held, dismissing the appeal:

(1) Having regard to the facts and circumstances of the case and applying the objective test whether there was any real danger of bias the court was satisfied that there was no real danger of bias in the learned trial judge's hearing of the case. The fact that the appellant was acquitted by the learned trial judge in the earlier case would mean that the appellant was not involved with the offence in that case. There was nothing in the grounds of judgment of the learned trial judge to indicate that he had taken other irrelevant matters besides the evidence presented before him in arriving at his decision. In the circumstances, the appellant had not established that his fundamental right to a fair trial had been violated in the proceedings before the learned trial judge (see para 37).

(2) From the facts, it was clear that the learned trial judge had merely taken the factor of the appellant's failure to produce his cautioned statement in assessing the weight of the appellant's evidence as a whole. It is trite law that an unsworn statement is a piece of evidence that has to be judicially considered and appreciated. Thus, the trial judge did not draw any adverse inference against the appellant for not producing his cautioned statement to back up his story (see para 40).

(3) This was a proper case to apply the provision under s 60 of the CJA as the evidence was overwhelmingly sufficient to support the trial judge's finding that the appellant was trafficking in the dangerous drugs. Under the circumstances, there was no substantial injustice had actually occurred (see para 46).

[Bahasa Malaysia summary

Perayu dan seorang lagi ('tertuduh kedua') telah dituduh bersama kerana kesalahan mengedar dadah berbahaya di Mahkamah Tinggi. Perayu telah disabit dan dihukum mati manakala tertuduh kedua telah dibebaskan dan dilepaskan di penutup kes pihak pendakwaan. Tertuduh oleh itu telah merayu terhadap keputusan itu. Kes tersebut pada mulanya telah bermula di hadapan Abdul Kadir Musa H dan kemudian disambung di hadapan RK Nathan H. Perayu telah mengutarakan tiga alasan rayuan utama, antara lain: (i) kegagalan hakim perbicaraan untuk menarik dirinya; (ii) salah arah di pihak hakim perbicaraan yang bijaksana dalam memutuskan bahawa perayu patut mengemukakan pernyataan beramarannya dan (ii) salah arah berhubung piawai pembuktian di akhir kes pembelaan. Peguam perayu berhujah bahawa keputusan hakim perbicaraan untuk meneruskan perbicaraan kes meskipun

keputusan terdahulunya menarik dirinya daripada mendengar perkara tersebut adalah salah di sisi undang-undang. Selanjutnya ia berhujah bahawa dalam keadaan berikut perayu tidak boleh dikatakan telah diberikan perbicaraan adil dan perayu oleh itu berhak terhadap pembebasan tanpa syarat dan rayuan itu patut dibenarkan. Adalah juga dihujahkan bahawa hakim perbicaraan yang bijaksana terkhilaf dari segi undang-undang dalam memutuskan bahawa perayu patut mengemukakan pernyataan beramarannya untuk menyokong ceritanya dan bahawa hakim tersebut telah membuat inferens bertentangan terhadap perayu oleh sebab kegagalannya mengemukakan pernyataan beramarannya. Perayu berhujah bahawa tiada penemuan oleh hakim perbicaraan yang bijaksana bahawa pendakwaan telah membuktikan kesnya terhadap perayu melampaui keraguan munasabah dan ianya memudaratkan kes pendakwaan. Pendakwaan berhujah bahawa hak perayu terhadap perbicaraan yang adil tidak dicabuli dan mahkamah perlu menentukan sama ada perayu telah membuktikan pencabulan hak asasinya terhadap perbicaraan yang adil. Pendakwaan juga berhujah, bergantung kepada *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 bahawa apabila hakim perbicaraan mengatakan pendakwaan telah berjaya membuktikan kes prima facie terhadap perayu apa yang dimaksudkan oleh beliau adalah kes tersebut telah dibuktikan melampaui keraguan munasabah. Secara alternatif ia dihujahkan bahawa sabitan itu masih kekal berdasarkan keterangan kes yang banyak dan bahawa tiada ketidakadilan sebenarnya berlaku dengan menggunakan proviso kepada s 60(1) Akta Mahkamah Kehakiman 1964 ('AMK').

Diputuskan, menolak rayuan:

(1) Dengan mengambilkira fakta dan keadaan kes dan menggunapakai ujian objektif sama ada terdapat apa-apa bahaya berat sebelah sebenar mahkamah berpuas hati bahawa tiada bahaya berat sebelah sebenar dalam perbicaraan kes hakim mahkamah yang bijaksana. Fakta bahawa perayu telah dibebaskan oleh hakim perbicaraan yang bijaksana dalam kes terdahulu bermaksud bahawa perayu tidak terlibat dengan kesalahan dalam kes tersebut. Tiada apa-apa dalam alasan-alasan penghakiman hakim perbicaraan yang bijaksana untuk menunjukkan bahawa beliau telah mengambilkira perkara-perkara lain yang tidak relevan selain daripada keterangan yang dikemukakan di hadapan beliau apabila tiba kepada keputusan beliau. Dalam keadaan itu, perayu tidak dapat membuktikan bahawa hak asasinya terhadap perbicaraan yang adil telah dicabuli dalam prosiding di hadapan hakim perbicaraan yang bijaksana (lihat perenggan 37).

(2) Berdasarkan fakta, ia jelas bahawa hakim perbicaraan yang bijaksana hanya telah mengambilkira faktor kegagalan perayu untuk mengemukakan pernyataan beramarannya dalam menilai beban keterangan perayu secara keseluruhan. Adalah undang-undang tetap bahawa kenyataan yang tidak diangkat sumpah adalah keterangan yang

perlu dipertimbangkan dan dihargai secara kehakiman. Oleh itu, hakim perbicaraan tidak membuat apa-apa inferens bertentangan terhadap perayu kerana tidak mengemukakan pernyataan beramarannya untuk menyokong ceritanya (lihat perenggan 40).

(3) Ini adalah kes yang wajar untuk menggunakan peruntukan di bawah s 60 AMK kerana keterangan yang banyak mencukupi untuk menyokong penemuan hakim perbicaraan bahawa perayu mengedar dadah berbahaya. Di bawah keadaan itu, tiada ketidakadilan ketara yang telah berlaku sebenarnya (lihat perenggan 46).]

Notes

For cases on cautioned statement, see 7(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2492–2511.

For cases on grounds of appeal, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 488–505.

Cases referred to

Abdul Karim bin Pak Kub & Anor v PP [1997] 2 MLJ 112; [1997] 1 AMR 264, CA (refd)

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)

Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293; [2006] 1 CLJ 577, FC (folld)

Francis Anthonysamy v PP [2005] 3 MLJ 389, FC (refd)

Haw Tua Tau v PP; Tan Ah Tee v PP; Low Hong Eng v PP [1981] 2 MLJ 49; [1981] CLJ 123, PC (refd)

Illian & Anor v PP [1988] 1 MLJ 421, SC (refd)

Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265; [1994] 2 CLJ 151, SC (folld)

Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)

Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 2 AMR 89, CA (refd)

Madheshwardhari Singh and another v State of Bihar 1986 AIR Pat 324 (refd)

Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241; [2003] 2 CLJ 65, CA (refd)

Muhamad Fadzli bin Ramli v PP [2003] 4 MLJ 292; [2003] 5 AMR 1, CA (refd)

PP v Choo Chuan Wang [1992] 2 CLJ 1242, HC (refd)

PP v Tan Gong Wai & Anor [1985] 1 MLJ 355 (refd)

State, The v Maksudan Singh and others 1986 AIR Pat 38 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 60, 60(1)

Criminal Procedure Code ss 180(1), 182A

Federal Constitution art 5(1)

Appeal from: Criminal Case No 45–28 of 1998 (High Court, Penang)

A

Karpal Singh (Jagdeep Singh Deo and Sangeet Kaur Deo with him) (Karpal Singh & Co) for the appellant.

Tetralina Ahmad Fauzi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

B

Hasan Lah JCA:

[1] The appellant (the first accused in the High Court) and another person C (the second accused) were jointly charged with an offence of trafficking in dangerous drugs in the High Court, Penang. The charge reads as follows:

> Bahawa kamu bersama-sama pada 4 haribulan Januari 1998, jam lebih kurang 9.30 malam di kawasan Kuarters Perikanan, Jalan Akurium Gelugur, dalam Daerah D Timur Laut, dalam Negeri Pulau Pinang, didapati ada mengedar dadah berbahaya iaitu ganja seberat 36,980 gram dan kamu bersama-sama telah melakukan kesalahan yang boleh dihukum di bawah seksyen 39B(2) Akta Dadah Berbahaya 1952.

E **[2]** The appellant was convicted and sentenced to death while the other person (the second accused) was acquitted and discharged at the close of the case for the prosecution. The accused therefore appealed against the decision of the trial judge in convicting him.

F **[3]** We heard this appeal on 14 and 15 October 2009 and unanimously dismissed it. We now give the grounds for our decision.

[4] For the purpose of this appeal it is necessary to set out the background to G this case in the High Court.

[5] This case was initially commenced before Abdul Kadir bin Musa J and the evidence of five witnesses had been recorded. He was then transferred to Kuala Lumpur with this case remaining part heard.

H

[6] RK Nathan J ('the learned trial judge') was then directed to take over the criminal court from Abdul Kadir bin Musa J. This part heard case then came before him on 4 November 2003 for hearing. On that day both counsel then indicated that they wished to have the case continued before Abdul Kadir bin I Musa J. Mr Athimulan, learned counsel for the appellant, also pointed out that the learned trial judge had heard a case in respect of a similar charge against the appellant where members of the same raiding party were involved. The learned trial judge had however acquitted and discharged the appellant in that case without his defence being called.

[7] The learned trial judge then ruled that it would not be proper for him to hear this case and directed counsel to write to the Rt Hon Chief Judge (Malaya) for his directions.

[8] The case was fixed for mention to await the direction of the Rt Hon Chief Judge (Malaya) on 10 December 2003, 20 February 2004 and 20 April 2004. On each occasion the learned trial judge was informed by counsel that they had not received any reply from the Rt Hon Chief Judge (Malaya).

[9] On 19 May 2004 counsel then agreed that the learned trial judge hear this case and continue with the evidence so far recorded.

[10] On 25 February 2009, this court allowed the appellant's application to adduce the affidavit of Mr M Athimulan, learned counsel for the appellant in the earlier case dated 20 January 2009, as evidence in this appeal. In that affidavit it was averred that the learned trial judge, while acquitting and discharging the appellant in the earlier case, remarked 'Make sure I do not see your face in my court anymore'.

[11] The case for the prosecution as found by the learned trial judge is as follows. On 2 January 1998 Det Sgt Jamil bin Daud ('PW8') received a call from an informer giving him information about a syndicate trafficking in drugs and that the head of the said syndicate was a person called Musa. The informer gave Musa's hand phone No 012–4871797.

[12] PW8 informed his superior DSP Junaid ('PW2') of the call. PW2 then directed PW8 to telephone Musa and pretending to be a purchaser of ganja from Kuala Lumpur. PW8 followed the instructions but could not get through to Musa.

[13] The next day when he was returning to Alor Setar from Kuala Lumpur PW8 stopped at Rawang Rest and Service Area at about 11pm. He was instructed by his immediate superior, ASP Rahman, to call Musa. He did so and was able to speak to a person on the other end named Musa. He introduced himself to Musa as a friend of one Man who was a friend of Musa. He told Musa that both he and this Man used to traffic in drugs when he was in Baling. He then asked Musa if he had the 'barang'. Musa said, 'Yes' and he asked Musa about the price per kg. Musa then told him the price was RM900 per kg. After negotiation they agreed to a price of RM850 per kg. Musa then directed PW8 to meet him at Gelugor, Penang.

[14] PW8 related the entire conversation to ASP Rahman who asked him to contact Musa again. PW8 called up Musa the next day and told him he would meet with Musa at 11pm in Penang. That afternoon PW2 had a meeting with

his men wherein PW2 handed PW8 RM30,000. Soon thereafter PW2 and his men left for Penang. PW8, on the way to Penang, was accompanied by Det L/Kpl Zulkifli ('PW10').

[15] At about 8.30pm they arrived at an eating shop at Jalan Akuarium in Gelugor. The rest of the group spread out in ambush and PW9 then called Musa and told him where he was and he told Musa of his car number. Soon thereafter a Malay man rode up to him on a motorcycle and identified himself as Musa. That Musa is the appellant in this case. PW8 told Musa he had brought with him RM30,000 and asked for 50kg of ganja. Musa told PW8 that for RM30,000 he could only supply PW8, 40kg to which PW8 agreed. PW8 then opened the zip of the bag tied to his waist and showed Musa the money. All this while Det L/Kpl Zulkifli bin Omar was seated beside him. Musa then told him to wait and left the scene.

[16] A short while later Musa returned driving a Proton Satria No PDG 9392 and told PW8 to follow him so that he could hand over the drugs to PW8. There was another person seated next to Musa. That person was the second accused in this case. As both the cars entered Jalan Kuarters Perikanan, the car driven by Musa made a right turn and abruptly made a u-turn. At that moment PW2, coming in another car, blocked Musa's car from the front whilst PW8, using his car, blocked the rear. PW8 and Det L/Kpl Zulkifli then arrested the passenger whilst PW2 and the rest arrested Musa.

[17] On examining the interior of the car PW2 discovered a sack at the back seat. It contained ganja. On examining the booth PW2 also discovered another sack which was also loaded with ganja.

[18] The government chemist ('PW7') found that the total weight of the entire drugs to be 16,811.8g in one sack and 18,228.9g in the other.

[19] PW6, the officer from the Road Transport Department Office, testified that the motorcar PDG 9392 belongs to the appellant at the material time.

[20] At the close of the case for the prosecution the learned trial judge found that a prima facie case had been made out against the appellant only. The second accused was therefore acquitted.

[21] In his defence the appellant, who elected to make a statement from the dock, said that on 3 January 1998 at about 9pm one Shamsul Nizam borrowed his car. On 4 January 1998 at about 8.45pm he went to Shamsul Nizam's house and saw his car there but Shamsul Nizam was not there. Shamsul's mother informed him that he had gone out for a while. The mother gave the car keys

to the appellant. As he reached his car the second accused came up to him and invited him for a meal at Astaka. This is the place where PW8 had said he met the appellant.

[22] They both got into the car and were busy talking. That was why he did not notice anything at the back seat of the car where the police had said they had found one gunny sack full of ganja. He also did not smell anything unusual.

[23] They reached Astaka at Gelugor at about 9.15pm. That was the first time he had been to that eating area. Since the car park was full he decided to park at Quarters Marine. Suddenly his path was blocked by a car from the front and one from his rear. They were then arrested by the police.

[24] From there both of them were taken to a house in Kampong Kastam. There he noticed PW2 and other officers seizing many packages and arresting 4–5 persons. This went on between 9.30pm to around 2am the next morning. They were then taken in a van to the police station together with the seized items from Kampong Kastam. The appellant denied trafficking in drugs. He also denied transporting them or being in possession of the same.

[25] At the close of the case for the prosecution the learned trial judge held that there was ample evidence of transporting to constitute trafficking against the appellant. In support of that finding the learned trial judge referred to the decisions of this court in *Abdul Karim bin Pak Kub & Anor v Public Prosecutor* [1997] 2 MLJ 112; [1997] 1 AMR 264, *Muhamad Fadzli bin Ramli v Public Prosecutor* [2003] 4 MLJ 292; [2003] 5 AMR 1, *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 2 AMR 89 and *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241; [2003] 2 CLJ 65.

[26] At the conclusion of the trial the learned trial judge held that the statement of the appellant from the dock was nothing more than a mere denial of knowledge of the existence of the drugs. He was satisfied that the appellant had not cast any doubt on the prosecution's case. He therefore found the appellant guilty as charged and convicted him.

[27] Before us, learned counsel for the appellant advanced three main grounds of appeal, namely:

(a) failure of the trial judge to recuse himself;

(b) misdirection on the part of the learned trial judge in ruling that the appellant ought to have produced his cautioned statement; and

(c) misdirection as regard to the standard of proof at the end of the defence case.

[28] With regard to the first ground learned counsel for the appellant submitted that the decision by the trial judge to continue hearing the case despite his earlier ruling recusing himself from hearing the matter was wrong in law. It was argued that the fact that the trial judge had earlier recused himself from hearing the matter shows that he himself could not for certain say that he would be able to try the appellant impartially and free from any bias and prejudice. Matters were compounded by the fact that in the earlier case, when the trial judge acquitted and discharged the appellant, he had made certain remarks against the appellant, namely 'Make sure I do not see your face in my court anymore'.

[29] Under the circumstances it was submitted that the appellant could not be said to have been given a fair trial. There was prejudice and a failure of justice, or at the very least there was a doubt as to whether the appellant was given a fair trial. The appellant was therefore entitled to an unconditional release and the appeal ought to be allowed on this ground alone. In support of that learned counsel cited the following cases:

(a) *Madheshwardhari Singh and another v State of Bihar* 1986 AIR Pat 324;

(b) *The State v Maksudan Singh and others* 1986 AIR Pat 38;

(c) *Public Prosecutor v Choo Chuan Wang* [1992] 2 CLJ 1242; and

(d) *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631.

[30] In response the learned deputy public prosecutor submitted that the appellant's right to a fair trial had not been violated as the appellant had been accorded a fair trial by the trial judge.

[31] In *Maksudan Singh*'s case the majority judgment of the Indian Supreme Court held that once a constitutional guarantee to speedy trial and the right to a fair, just and reasonable procedure had been violated, then the accused was entitled to unconditional release and the charges against him would fall to the ground. This view was reaffirmed in *Madheshwardhari Singh*'s case.

[32] In *Choo Chuan Wang*'s case learned counsel for the accused submitted that the accused had been prejudiced by the long delay and there had been a denial of his constitutional right and as such the accused was entitled to an order of acquittal. A number of Indian authorities, including the two cases mentioned above, were cited to the learned High Court judge, Edgar Joseph Jr J (as he then was) to support that.

[33] In his judgment, Edgar Joseph Jr J said at p 1245 that:

> In the circumstances, applying a generous interpretation and avoiding the 'austerity of tabulated legalism', I would respectfully agree with the decisions of the Indian Supreme Court and hold that art 5(1) of our Constitution does imply in favour of an accused person the right to a fair hearing within a reasonable time by an impartial court established by law. It follows that if an accused person can establish a breach of this right then, in the words of Sandhawalia CJ in *Madheswardhari Singh and another v State of Bihar* 1986 AIR Pat 324, he would be entitled to an unconditional release and the charges levelled against him would fall to the ground.

[34] In *Lee Kwan Woh*'s case the learned trial judge ruled that he did not wish to hear submissions as he was satisfied that the prosecution had made out a prima facie case as required by s 180(1) of the Criminal Procedure Code. In the Federal Court the accused submitted that the learned judge's ruling had violated his guaranteed right to a fair procedure by virtue of art 5(1) of the Federal Constitution. Gopal Sri Ram FCJ, after referring to the judgment of Edgar Joseph Jr J in *Choo Chuan Wang*'s case, said at p 316 (MLJ) that:

> [19] We must consider the impact of what we have said thus far on the facts of the instant case. In our judgment, the constitutionally guaranteed right in an accused to a fair trial includes his right to make a submission of no case at the close of the prosecution's case. It is a right that he or she may waive. But he or she cannot be deprived of it. That unfortunately is what happened here. The accused accordingly did not have a fair trial and art 5(1) was violated. Following *Public Prosecutor v Choo Chuan Wang* [1992] 2 CLJ 1242, he is entitled to have his conviction set aside on this ground.

[35] The question for our determination therefore was whether the appellant had established a violation of his fundamental right to a fair trial in the instant case.

[36] The issue here was whether, using an objective test, there was a real danger of bias on the part of the trial judge in continuing to hear the case, taking into account the circumstances of the case (see *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293; [2006] 1 CLJ 577).

[37] Having regards to the facts and circumstances of the case and applying the objective test whether there was any real danger of bias we were satisfied that there was no real danger of bias in the learned trial judge's hearing of the case. The appellant was acquitted by the learned trial judge in the earlier case. It means he was not involved with the offence in that case. The appellant was represented by the same counsel in this case from the beginning who was also familiar with the facts in the earlier case. He had agreed to the learned trial judge continuing to hear the case. What was said by the learned trial judge when acquitting the appellant in the earlier case was nothing more than giving advice to the appellant to refrain from getting involved in criminal activity. It is normal for some judges to say a few words of advice to an accused when giving his decision in a criminal trial. More importantly there was nothing in the grounds of judgment of the learned trial judge to indicate that he had taken other irrelevant matters besides the evidence presented before him in arriving at his decision. As such we were of the view that the appellant had not established that his fundamental right to a fair trial had been violated in the proceedings before the learned trial judge.

[38] With regard to the second ground, learned counsel for the appellant submitted that the learned trial judge was wrong in law in ruling that the appellant ought to have produced his cautioned statement to back up his story. It was the contention of the appellant that by implication the learned trial judge had made an adverse inference against the appellant by virtue of his failure to produce his cautioned statement. It is trite law that an adverse inference cannot be made against an accused in the way he conducts his defence (see *Illian & Anor v Public Prosecutor* [1988] 1 MLJ 421).

[39] For ease of reference we reproduce here the relevant part of the learned trial judge's judgment, which can be found at p 190 of the appeal record, wherein he said:

> I find that the statement of the accused from the dock was nothing more than a mere denial of knowledge of the existence of the drugs. The story of Shamsul Nizam was not even put to the prosecution's witnesses to enable them to verify the said story. Alternatively such a story if true was a valid defence and if that had been narrated in the cautioned statement, the said cautioned statement could have been produced to back up his story. This is what the second accused did in any case.

[40] With respect, we are unable to agree with the appellant that there was a misdirection by the learned trial judge. From the passage reproduced above it is clear that the learned trial judge had merely taken this factor into account in assessing the weight of appellant's evidence as a whole (see *Public Prosecutor v Tan Gong Wai & Anor* [1985] 1 MLJ 355). It is trite law that an unsworn statement is a piece of evidence that has to be judicially considered and

appreciated. The trial judge therefore did not draw any adverse inference against the appellant for not producing his cautioned statement to back up his story.

[41] We turn now to the appellant third ground of appeal. Learned counsel for the appellant submitted that the learned trial judge had failed to apply the correct test as regards the standard of proof at the end of the defence case when he ruled that 'the prosecution had successfully proved a prima facie case against the accused and that the accused statement had not cast any doubt in the prosecution case'. There was no finding by the learned trial judge that the prosecution had proved its case against the appellant beyond reasonable doubt. This was fatal to the prosecution case. In support of that learned counsel for the appellant cited the case of *Francis Anthonysamy v Public Prosecutor* [2005] 3 MLJ 389 and s 182A of the Criminal Procedure Code.

[42] The relevant part of the trial judge's judgment is as follows:

> Having analysed both the final submissions, I was satisfied that the prosecution had successfully proved a prima facie case against the accused and that the accused's statement had not cast any doubt in the prosecution's case.

[43] At the end of the trial, s 182A of the Criminal Procedure Code imposes a duty on the trial court to consider all the evidence adduced before it and to decide whether the prosecution has proved its case beyond reasonable doubt.

[44] In response the learned deputy public prosecutor submitted that in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 the Federal Court has explained that a prima facie evidence must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. As such when the trial judge said the prosecution had successfully proved a prima facie case against the appellant what he meant was the case had been proved beyond reasonable doubt.

[45] Alternatively it was submitted that the conviction was still safe having regard to the overwhelming evidence of the case and that no substantial injustice had actually occurred by applying the proviso to s 60(1) of the Courts of Judicature Act 1964 which is as follows:

> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

[46] We agreed with the alternative submission of the learned deputy public prosecutor. In our view this was a proper case to apply the said provision as the

A evidence was overwhelmingly sufficient to support the trial judge's finding that the appellant was trafficking in the dangerous drugs and under the circumstances there was no substantial injustice had actually occurred. We found support in our view in the decision of the Supreme Court in *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265; [1994] 2 CLJ
B 151.

[47] In *Khoo Hi Chiang*'s case the learned High Court judge applied the wrong test when calling for the defence. On appeal to the Supreme Court it was argued by the accused that the learned High Court judge was wrong in relying
C on the test laid down in *Haw Tua Tau v Public Prosecutor; Tan Ah Tee v Public Prosecutor; Low Hong Eng v Public Prosecutor* [1981] 2 MLJ 49; [1981] CLJ 123 as the onus on the prosecution at the close of the prosecution case was to tender evidence, which if unrebutted, would warrant a conviction. The Supreme Court agreed that the learned High Court judge had applied the wrong test but
D the Supreme Court decided to apply the proviso to s 60 of the Courts of Judicature Act 1964 to affirm the convictions and sentences because of the overwhelming nature of the case for the prosecution and no substantial injustice had actually occurred. Edgar Joseph Jr SCJ made the following observation at pp 292–293 (MLJ); pp 173–174 (CLJ):

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> In the circumstances, although the judge applied the *Haw Tua Tau*'s test — which, in our view, was the wrong test — when calling for the defence, we consider that the error was of no consequence, and did not vitiate the convictions, because, even had he applied the more stringent test to which we have referred and discussed, we are
F completely convinced that the result would have been the same, having regard to the absolutely overwhelming nature of the case for the prosecution. We are therefore satisfied that no substantial injustice has actually occurred and so we apply the proviso to s 60 of the Courts of Judicature Act 1964 …

G **[48]** In conclusion, having very carefully scrutinised the evidence on record and carefully examined the judgment under appeal we were satisfied beyond reasonable doubt that the conviction of the appellant was safe. The appeal was accordingly dismissed. The conviction entered against and the sentence passed upon the appellant were affirmed.

H

Appeal dismissed.

Reported by Mashrifah Ravendran

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